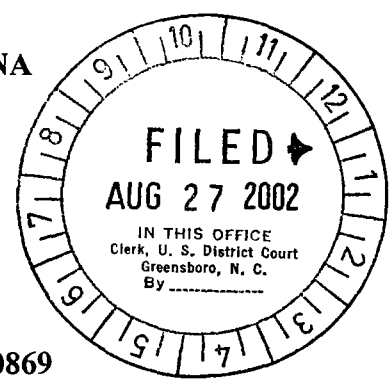


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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**



ELIZABETH CURTIS,)
)
 Plaintiff,)
)
 v.)
)
 NORFOLK SOUTHERN RAILWAY CO.,)
 a Virginia corporation, WORLDCOM,)
 INC., a Georgia corporation, and MCI)
 WORLDCOM NETWORK SERVICES,)
 INC., a Delaware corporation,)
)
 Defendants.)

1:01CV00869

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before the court on the motion of Defendant Norfolk Southern Railway Co. (“Norfolk Southern”) for summary judgment. (Pleading No. 24.) Plaintiff Curtis opposes the motion.

Background

This action involves a dispute over the burying and construction of fiber optic cable lines beneath a railroad corridor in North Carolina. Plaintiff Elizabeth Curtis owns a single-family brick residence and 1.80 acres of land located at 7024 McClellan Road, Pleasant Garden, North Carolina, abutting a railroad operated by Defendant Norfolk Southern. The railroad tracks adjacent to Plaintiff’s property are part of what is known as the “CF line,” which is part of the Norfolk Southern system running from Greensboro to Gulf, North Carolina. Plaintiff does not dispute that Norfolk Southern holds a right-of-way over this property, which was granted at some time in the past. The

terms and nature of the right-of-way are not part of the summary judgment record, but it will be assumed for purposes of this motion that the railroad's right in the corridor is merely an easement.

In the late 1980's, Norfolk Southern and MCI WorldCom Network Services, Inc. ("MWNS") entered into a licensing agreement that permitted MWNS to install fiber optic cable within and along Norfolk Southern's right-of-way, in return for certain fees paid to the railroad company. (Pleading No. 23, David L. Goodwin Aff., ¶¶ 5-6.) Installation of the underground cable was complete by June 1990. *Id.* ¶ 7. The location of the fiber optic cable has always been marked by orange and white, above-ground signs. *Id.* ¶ 8; Pleading No. 27, T. E. Sizemore Aff., ¶ 5, Ex. A.

Plaintiff Curtis filed this putative class action on August 9, 2001 in the General Court of Justice of Guilford County, Superior Court, seeking damages and declaratory relief against Defendants WorldCom, Inc. ("WorldCom"), MCI WorldCom Network Services, Inc. ("MWNS") and Norfolk Southern Railway ("Norfolk").¹ Plaintiff alleges that Defendants, without Plaintiff's consent and without the right to do so, installed, maintained and operated the fiber optic cable through Plaintiff's land without paying or offering sufficient compensation to Plaintiff. (Pleading No. 1, Ex. A.) Plaintiff relies on eight separate legal theories to seek relief, including trespass, continuing trespass, unjust enrichment, slander of title, excessive use of right-of-way, civil conspiracy, declaratory relief and inverse condemnation. *Id.* The primary relief sought by Plaintiff is damages or compensation for the additional servitude created by installation of the fiber optic cable. (Pleading No. 1, Ex. A, ¶ 8.)

¹ Plaintiff voluntarily dismissed her claims against WorldCom on December 26, 2001 (Pleading No. 12). MWNS filed a Voluntary Petition under Chapter 11 of the United States Bankruptcy Code on July 21, 2002, and proceedings in this action have been stayed pending action by the bankruptcy court. This case was administratively closed as to MWNS on August 7, 2002.

Defendants removed the action to federal court based on diversity of citizenship jurisdiction. Norfolk Southern, in its answer, admitted that MWNS's fiber optic cable was installed in the right-of-way pursuant to a license agreement with MWNS. Norfolk Southern denies that it has violated Plaintiff's rights and alleges various affirmative defenses, including the statute of limitations as a bar to Plaintiff's claims. It is the statute of limitations defense that is before the court on this motion for summary judgment.

Analysis

Defendant maintains that Plaintiff's claims are barred by the statute of limitations that appears in § 1-52(17) of the North Carolina General Statutes. Under that section, a three-year statute of limitations applies in actions

[a]gainst a public utility, electric or telephone membership corporation, or a municipality for damages or for compensation for right-of-way or use of any lands for a utility service line or lines to serve one or more customers or members unless an inverse condemnation action or proceeding is commenced within three years after the utility service line has been constructed.

N. C. Gen. Stat. § 1-52(17).²

The Western District of North Carolina applied § 1-52(17) and dismissed in their entirety claims against Norfolk Southern and Sprint Communications Company in a suit virtually identical to this one. (Pleading No. 22, Exs. B and C, *Gasperson v. Sprint Communications Co.*, Civil No. 1:95CV208, Memorandum of Opinion and Order of Dismissal (W.D.N.C. April 16, 1996) and Memorandum and Order (W.D.N.C. June 17, 1996). The rulings in that case were affirmed by the

² Similarly, under N. C. Gen. Stat. § 1-51, the period during which a landowner may sue a railroad company for permanent damages or compensation "for right-of-way or use and occupancy of any lands by the company for use of its railroad" is five years. N. C. Gen. Stat. § 1-51(1); *see also Love v. Postal Telegraph-Cable Co.*, 221 N. C. 469, 20 S. E. 2d 337, 338 (1942).

Fourth Circuit in an unpublished opinion. *See Gasperson v. Sprint Communications Co.*, No. 96-1940, 1997 WL 770931 (4th Cir. Dec. 16, 1997) (unpublished opinion).

In *Gasperson*, Sprint Communications Company, pursuant to a license agreement with Norfolk Southern, buried fiber optic cable along an easement that Norfolk Southern had obtained decades before from the plaintiffs' predecessor. Sprint installed the cable in 1987 without the landowner's permission, but erected signs indicating the presence of the underground cable. In 1995, the *Gasperson* plaintiffs filed suit against Sprint and Norfolk Southern alleging trespass, conspiracy to trespass, conversion, conspiracy to convert income derived from the land, and violations of the Racketeer Influenced and Corrupt Organization Act ("RICO").

In its April 1996 Order, the court dismissed the RICO, conversion and conspiracy to convert income claims on grounds that Norfolk and Sprint were expressly entitled by operation of North Carolina law to enter into license agreements for the installation of fiber optic cable along existing railroad easements without notice to the plaintiffs. (Pleading No. 22, Ex. B at 6-8, citing N. C. Gen. Stat. §§ 62-180, 62-182, 62-183 and 40A-51.) In its June 1996 Order, the court dismissed the trespass and derivative claims because the plaintiffs had not filed suit within the statutory period specified by N. C. Gen. Stat. § 1-52(17). (Pleading No. 22, Ex. C at 3-4, also citing N. C. Gen. Stat. § 1-51.) The court explained that even assuming the fiber optic lines are an additional burden upon the land, for which the landowner is entitled to permanent damages or compensation,

[b]ecause Defendant Sprint installed its fiber optic cable across the Plaintiff's property more than three years prior to the filing of the Plaintiff's initial complaint, and because no inverse condemnation proceeding was ever commenced, the Court concludes that § 1-52(17) bars any resulting trespass action, as well as any resulting conspiracy to trespass action, against the Defendants both for damages incident to the original trespass and for permanent damages.

Id. at 4. The court noted that the North Carolina cases relied on by the plaintiffs -- which held that actions against public utilities (such as telegraph companies) were not subject to statutory limitations short of the twenty-year period to establish title by adverse possession -- were decided before the 1981 enactment of N. C. Gen. Stat. § 1-52(17). *Id.* at 4 (discussing *Love v. Postal Telegraph-Cable Co.*, 221 N. C. 469, 470, 20 S. E. 2d 337, 338 (1942); *Teeter v. Postal Telegraph Co.*, 172 N. C. 783, 786, 90 S. E. 941 (1916); *Geer v. Durham Water Co.*, 127 N. C. 349, 354, 37 S. E. 474, 476 (1900)).

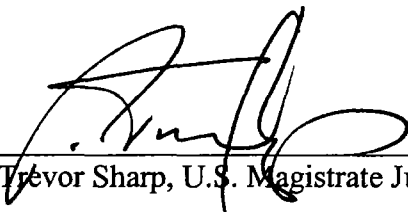
Plaintiff Curtis makes three arguments in opposition to the motion for summary judgment. First, Plaintiff, as in *Gasperson*, relies on case-law predating the enactment of N. C. Gen. Stat. § 1-52(17) to argue that because she seeks permanent damages for the installation of fiber optic cable, the twenty-year statute of limitations applicable to claims of adverse possession establishes the outer time limit for her claims. As recognized in *Gasperson*, however, the more specific language of § 1-52(17) supersedes the general principle recognized in the older case law. Second, Plaintiff argues that § 1-52(17) does not apply because MWNS had no “right-of-way” to abuse. Plaintiff overlooks the broader language of § 1-52(17), which sets a limitations period for suits seeking “damages or for compensation for right-of-way *or use* of any lands for a utility service line or lines to serve one or more customers or members” *Id.* (emphasis added). Finally, Plaintiff maintains that § 1-52(17) does not apply since it cannot be reconciled with N. C. Gen. Stat. § 40A-51, which provides a two-year statute of limitations for inverse condemnation proceedings against public entities. Section 40A-51 is inapposite here, as it applies only to public condemnors and local public condemnors as defined by N. C. Gen. Stat. § 40A-3. In any event, § 40A-51 is a statute of general applicability whereas § 1-52(17) is a statute of specific applicability that applies to claims against a *subset* of entities who might be subject to inverse condemnation claims.

This court finds the reasoning of *Gasperson* persuasive. Following the *Gasperson* court's interpretation of North Carolina law, a plaintiff's claims based on the allegedly unauthorized installation of telecommunications and other utility lines are barred unless the aggrieved landowner brings suit within three years after the line has been constructed. Plaintiff filed this suit against Defendants on August 9, 2001, over eleven years after the cable installation was constructed. Her claims are therefore barred by the applicable statute of limitations.

Plaintiff suggests that summary judgment is inappropriate because there has been insufficient time for discovery, and maintains that if she is given additional time, she might discover evidence that MWNS entered the property after 1990 to install additional fiber optic cables, a separate trespass that would bring her action within the three-year statute of limitations. Plaintiff's argument fails for several reasons. Plaintiff has not, as required by Federal Rule of Civil Procedure 56 (f), submitted an affidavit detailing her need for discovery. Neither has Plaintiff cited any authority for the legal proposition urged. The motion for summary judgment is timely and meritorious.

Conclusion

For the reason set forth above, **IT IS RECOMMENDED** that Norfolk Southern Railway Co.'s motion for summary judgment (Pleading No. 24) be granted.



P. Trevor Sharp, U.S. Magistrate Judge

August 27, 2002